B. DIALDAS & CO. (PTE.) LTD. v. SIN SIN & CO. & ORS.

[O.C.J. (Chong Yik Liong J.) June 21, 1983]
[Miri — Suit No. MR. 30 of 1981]

Practice & Procedure — Judgment in default of appearance obtained against defendants — Application to set aside "regular judgment" — Court's discretion — No prescribed time limit within which application for relief should be made — Principle applied by court — R.H.C. 1980, O. 13 r. 8.

The plaintiff company obtained judgment in default of appearance in a Subordinate Court in Singapore against the first defendant on September 20, 1980 for the price of goods sold and delivered, S$4,714.65/M$4,938.60. On February 25, 1981 the plaintiff company issued a fresh Writ in Miri against the first defendant firm and the second, third and fourth defendants as partners in the first defendant firm for the price of goods sold and delivered or alternatively to realise the aforesaid Singapore judgment. The Writ was duly served on the first and third defendants on April 8, 1981. On March 16, 1982, the plaintiff entered judgment in default of appearance against the first and third defendants for the amount claimed and costs. No steps were taken by the first and third defendants until December 18, 1982 when they took out a Summons-in-Chambers to set aside the default judgment on the ground that they had a good defence on the merits.

Held: (1) Order 12 rule 8 of the Rules of the High Court, 1980 gives a completely unfettered discretion to the court to set aside a judgment entered in default. The rule does not prescribe the time limit within which the application for relief should be made;

(2) the court's discretion under the rule must, however, be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit showing a "defence on the merits";

(3) non-submission to the jurisdiction of the Singapore Court was sufficient to raise a triable issue as to whether the Singapore judgment was binding on the first and third defendants. However, in view of the fact that no defence on the merits had been shown to the original claim for goods sold and delivered, the success in raising a triable issue on the alternative claim alone could not afford a sufficient ground for the grant of the order setting aside the judgment obtained in default of appearance in this action;

(4) to entitle the defendants applicants herein to the order sought, it must be shown that there was a triable issue on each of the alternative claims;

(5) the application should be dismissed, with costs to the plaintiff.

Cases referred to:

(1) *Farden* v. *Richter* (1889) 23 Q.B.D. 124.
(2) *Evans* v. *Bartlam* [1937] A.C. 473.
(3) *Burns* v. *Kondel* [1971] 1 Lloyd's Rep. 554.

CIVIL SUIT.

George Lim for the plaintiff.
M.S. Sandhu for 1st and 3rd defendants.

Cur. Adv. Vult.

Chong Yik Liong J. (RULING): This is an application by the 1st and 3rd Defendants by way of a Summons in Chambers dated December 18, 1982, for an order that the judgment in default of appearance obtained by the Plaintiff against them on March 16, 1982 be set aside.

The facts leading to the present application are briefly these. On February 25, 1981, the Plaintiff issued a Writ of Summons against the four Defendants herein (the 1st Defendant being sued as a firm, and the 2nd, 3rd and 4th Defendants as partners in the 1st Defendant firm) claiming S$4,714.65 equivalent to M$4,938.60 for the price of goods sold and delivered or alternatively upon a judgment of the Subordinate Court in Singapore, which was obtained by the Plaintiff against the 1st Defendant firm on September 20, 1980. The Writ was duly served on the 1st and 3rd Defendants on April 8, 1981. No appearance was entered by either of them and on March 16, 1982, the Plaintiff entered judgment against the 1st and 3rd Defendants for the amount claimed and costs in default of appearance. No steps were taken by the 1st and 3rd Defendants until December 18, 1982 when they took out a Summons-in-Chambers to set aside the default judgment on the ground that they had a good defence on the merits.

Order 13 rule 8 of the Rules of the High Court, 1980 gives a completely unfettered discretion to the Court to set aside a judgment entered in default of appearance. The rule does not prescribe the time limit within which the application for relief should be made, and it is this that leads me to believe that delay or lapse of time is no bar to the application and does not preclude the Court from the exercise of the discretion in a fit and proper case. However, it appears to me that the Court's discretion under that rule must be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a defence on the merits (see *Farden* v. *Richter*[1] and *Evans* v. *Bartlam*[2]), and "defence on the merits" as explained by Lord Denning, M.R. in *Burns* v. *Kondel*[3], means "a defence which discloses an arguable and triable issue".

There is no dispute that the judgment which the present application seeks to set aside was a regular judgment, and the question which I have to decide in this application is whether the affidavits in support thereof have disclosed a triable issue, so as to justify the Court to exercise the discretion to grant the relief sought in this application.

With regard to the Plaintiff's claim for goods sold and delivered, the 3rd Defendant in his first affidavit affirmed on September 24, 1982, merely stated (1) that he did not order the goods, and (2) that the goods were never delivered to or received by him. It

is only in his second affidavit affirmed on January 24, 1983 in reply to the affidavits of Chew Peng Hui, Plaintiff's advocate, and Rup Lal s/o Devidass, Plaintiff's salesman, respectively affirmed on January 12 & 14, 1983, that the 3rd Defendant added that he was at the material time the sole proprietor of the 1st Defendant firm, having sole management and control of its business, and that the 2nd and 4th Defendants, having retired respectively on January 26, 1955 and December 31, 1972, were not in any way concerned with the business of the 1st Defendant firm when the goods were alleged to have been purchased and, therefore, could not have ordered the goods, received them or agreed to make payment of the purchase price thereof on behalf of the 1st Defendant firm. Learned Counsel for the 1st and 3rd Defendants submitted that these facts and those stated in the first affidavit were sufficient to show that the 1st and 3rd Defendants had a defence on the merits, such as would entitle them to the order to set aside the default judgment. I would have agreed with this submission had it not been for the presence of other facts to which I shall shortly refer, and which had not been disputed or adequately displaced by the 3rd Defendant in his second affidavit in reply.

Rup Lal had in his affidavit deposed that he personally obtained an order from a partner of the 1st Defendant firm for the purchase of the goods therein mentioned and that the said goods were shipped to the 1st Defendant firm in two shipments under two bills of lading respectively exhibited thereto as "RLD 1" and "RLD 2". However, the 3rd Defendant in his second affidavit in reply only stated to the effect that no order for the said goods was ever made by or on behalf of the 1st Defendant firm and that the said goods were never delivered to the 1st Defendant firm or received by or on behalf of the 1st Defendant firm; but he was completely silent on the two bills of lading under which the said goods were said to have been shipped to the 1st Defendant firm. In *Halsbury's* Laws of England, 3rd Edition, Vol. 35 at page 332, it is stated that a bill of lading is "a symbol of the right of the property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer, being a symbolical delivery of the goods, has by mercantile usage the same effect as an actual delivery in the same circumstances"; and at page 346, it is stated that "the issue or transfer to the buyer of a bill of lading operates *prima facie* as a delivery to the buyer of the goods shipped". In the present case, the two bills of lading were respectively issued to the 1st Defendant firm, without any reference for delivery to its order or assigns, and the fact that they were so issued was not disputed by the 3rd Defendant. In the light of this, I am of the view that the 3rd Defendant's reply in terms of a general denial was not sufficient to displace the *prima facie* evidence of delivery of the goods shipped to the 1st Defendant firm under the two bills of lading.

Further, Rup Lal had also described the events following the shipment of the goods, with a view to showing that there could not be a defence on the merits. Paragraph 4 of his affidavit reads as follows:

> "4. After the said shipments were made, the Plaintiffs made several demands both oral and in writing to the 1st Defendants for the payment of the price of the aforesaid goods. In reply to these demands, the 1st Defendants either requested more time to pay or assured the Plaintiffs that they would pay. During this time, the 1st Defendants never denied that they ordered the goods nor was the fact of delivery of the goods and the receipt of the same ever challenged by the 1st Defendants."

In reply, the 3rd Defendant stated in paragraph 3(3) of his second affidavit as follows:

> "3. I deny that I had agreed to pay for the goods in question or requested for more time to do so. Nor did I authorise any person to do the same on behalf of the said firm."

To my mind, the reply by the 3rd Defendant in terms and stated above was wholly inadequate to show the non-existence of the facts relating to the conduct of the parties subsequent to the shipments of the goods, in that it impliedly supported the fact that demands for the payment of the price of the goods had, in fact, been made by the Plaintiff, and it did not at all displace the fact that the 1st Defendant firm never denied ordering the goods nor the delivery and receipt of the goods during the time when demands for payment were made.

By reason of the failure on the part of the 3rd Defendant to challenge or to state sufficient facts to displace the existence of the facts which I have referred to above, I find that the facts deposed to in his two affidavits are not enough to raise a triable issue in respect of the Plaintiff's claim for goods sold and delivered.

As to the Plaintiff's alternative claim upon the judgment of the Subordinate Court in Singapore, the 3rd Defendant in his first affidavit stated that he did not appear in that action nor did he submit to the jurisdiction of that Court, although he was served with the Summons at Miri to appear before that Court. It appears that the 1st and the 3rd Defendants were at the material time not resident or carrying on business in Singapore where the judgment sued on was obtained in default of appearance and, in the light of this, I am of the view that non-submission to the jurisdiction of the Singapore Court is sufficient to raise a triable issue as to whether the Singapore judgment is binding on the 1st and 3rd Defendants. However, in view of the fact that no defence on the merits has been shown to the original claim for goods sold and delivered, the success in raising a triable issue on this alternative claim alone cannot afford a

sufficient ground for the grant of the order setting aside the judgment obtained in default of appearance in this action. To entitle the defendants applicants herein to the order sought, there must be shown that there is a triable issue on each of the alternative claims. Success in raising a triable issue on one or the other of the alternative claims is not enough.

For reasons stated above, I would dismiss this application with costs to the Plaintiff to be taxed.

Application dismissed.

Solicitors: *Battenberg & Talma; M.S. Sandhu & Co.*

PENDAKWA RAYA v. CHEAH BENG POH & ORS. CHEAH BENG POH & ORS. v. PENDAKWA RAYA

[A.Cr.J. (Hashim Yeop A. Sani F.J.) August 15 & 16; & September 8, 1983]
[Kuala Lumpur — Criminal Appeal No. 16 of 1983]

Criminal Law & Procedure — "Unlawful assembly" — Meaning of — Police Act 1967, s. 27(5).

Evidence — Unlawful assembly — Onus of proof — Whether there was licence — Evidence Act 1950, s. 106.

Criminal Law & Procedure — Prima facie case at close of case for prosecution — Accused electing to remain silent — Criminal Procedure Code, s. 173A (ii)(a).

On June 19, 1982 42 lawyers were charged under section 27(5) of the Police Act, 1967 (the Act) for having taken part in an unlawful assembly in a public place without a licence. They all claimed trial. Three lawyers had their case deferred. The case against the 39 was heard on February 9, 1983. On that day, the appellants were called to make their defence after the close of the prosecution case. The learned President then recorded that the charge had been proved. After hearing submission from defence counsel and the prosecution the learned President admonished and discharged the appellants under section 173A (ii)(a) of the Criminal Procedure Code.

The Public Prosecutor appealed against the sentence and the lawyers appealed against the finding that the charge had been proved.

Held: (1) under section 27(5) of the Act, an assembly, meeting or procession which takes place without a licence shall be deemed to be an unlawful assembly;

(2) the concept of assembly includes any coming together of persons. An assembly is complete, as it were, by collection or aggregation: no form or object in coming together is required;

(3) two classes of persons may be charged under section 27(5): they are the convenors of the assembly, meeting or procession and persons who take part in such assembly, meeting or procession;

(4) under section 27(5), the prosecution has to prove that there was an assembly, that no licence had been issued in respect of the assembly and that the accused persons took part in the assembly and the onus is then cast on the defendants to rebut the presumption;

(5) the charge neither contains any element extraneous to nor omits any element from section 27(5) of the Act. The appellants were therefore not misled or in any way prejudiced by the charge.

Cases referred to:

(1) *Ragunathan* v. *Public Prosecutor* [1982] 1 M.L.J. 139, 141.
(2) *Public Prosecutor* v. *Ismail & Ors.* [1976] 1 M.L.J. 183.
(3) *Duport Steels Ltd.* v. *Sirs* [1980] 1 All E.R. 529, 551.
(4) *Vacher & Sons Ltd.* v. *London Society of Compositor* [1913] A.C. 107.
(5) *R.* v. *Graham & Burns* (1888) 4 T.L.R. 212.
(6) *Public Prosecutor* v. *Sihabduin & Anor.* [1980] 2 M.L.J. 273.

CRIMINAL APPEAL.

Mohtar Abdullah (Deputy Public Prosecutor) for the Public Prosecutor.

Lim Kean Chye, Ng Ek Tiong, R.T.S. Khoo, Sri Ram, Raja Aziz Addruse and S. Theivanthiran for the respondents.

S. Sivasubramanian for Malayan Bar Council.

Cur. Adv. Vult.

Hashim Yeop A. Sani, F.J.: On June 19, 1982, 42 lawyers charged for an offence under section 27(5) of the Police Act, 1967 were brought before the President of Sessions Court Kuala Lumpur sitting as Magistrate. The charge was that on April 7, 1981 they had taken part in an unlawful assembly in a public place for which no licence had been issued under that section of the Police Act. They all claimed trial. Three lawyers had their case deferred. The case against the 39 was eventually heard and finally disposed of on February 9, 1983. What the learned President did on February 9, 1983 was to call upon the appellants to make their defence after the close of the prosecution case. All the appellants elected to remain silent. The learned President then recorded that the charge had been proved. After hearing submissions from all the defence counsel and the Deputy Public Prosecutor, the learned President admonished and discharged the appellants under section 173A (ii)(a) of the Criminal Procedure Code. The Public Prosecutor appealed against the sentence and the lawyers appealed against the finding that the charge had been proved. Both notices of appeal were filed on the same date on the last day for the notice to be filed.

For convenience, I will deal first with the appeal against the finding of guilt.

The grounds of appeal including the additional grounds allowed before the commencement of the hearing on the appeal may be classified broadly as follows:

(1) Defects in the charge;

(2) Grounds against specific findings made by the learned President;